MAR 8 1976

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1975

No. 75-1271

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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March 8, 1976

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trict of California is reported at 363 F. Supp. 644 (1973). For convenience, a copy of it appears as Appendix "B" hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on November 10, 1975. The time for filing this petition for Writ of Certiorari was extended by Mr. Justice Rehnquist on January 26, 1976, to and including March 8, 1976. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Under the facts of this case was the release of the Santa Fe crew involved at Stockton, California, which is admittedly a "terminal" where adequate facilities for food and lodging are available, and which is an historical release point for such a crew, a release at a "designated terminal" within the meaning of Section 1(b)(3)(B) of the Hours of Service Act, 45 U.S.C. § 61(b)(3)(B)?

STATUTORY PROVISION INVOLVED

Section 1(b)(3)(B) of the Hours of Service Act, 45 U.S.C. § 61(b)(3)(B), limiting the "on duty" time of railroad operating employees, provides:

> "(3) Time on duty shall commence when an employee reports for duty and terminate when the employee is finally released from duty, and shall include:
>
> (A) Interim periods available for rest at other than a designated terminal;
>
> (B) Interim periods available for less than four hours rest at a designated terminal . . . ."

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STATEMENT OF THE CASE

In preparation for filing of this test suit, counsel for Santa Fe negotiated with counsel for the Federal Railroad Administration (hereafter "FRA"), the agency charged by Congress and the Secretary of Transportation with the duty of carrying out the provisions of the Hours of Service Act, 45 U.S.C. §§ 64a(a), (b), 64b, 49 C.F.R. § 149(d), a carefully drawn "Stipulation of Facts" upon which the case was to be submitted to the courts. Referred to throughout the proceedings below—and herein—as the "FRA Stipulation," it was signed by counsel for Santa Fe and the Chief Counsel, Department of Transportation, Federal Railroad Administration, and the Assistant Chief Counsel, Enforcement Division, Department of Transportation, Federal Railroad Administration. Insofar as Santa Fe is concerned, this is *the* Stipulation which must control this case. Since the government's leading attorneys involved in administration of the Hours of Service Act also signed this Stipulation, we can only conclude that the United States, acting through the FRA, also believes that this is *the* Stipulation.

The FRA Stipulation, in its entirety, presents the best possible Statement of this case. It reads:

> *"STIPULATION OF FACTS*
>
> "It has been agreed and is hereby stipulated by and between the United States of America (hereafter 'Government') and Defendant, The Atchison, Topeka and Santa Fe Railway Company (hereafter 'Santa Fe'), that the following is a statement of the facts and the issue involved in this proceeding, that this statement constitutes all of the relevant facts, and that no additional facts or departure from those recited herein will be considered in the determination of this case:

"1. This action is brought under the Act of Congress known as the 'Hours of Service Act' (U.S. Code, Title 45, Sections 61 to 64b, inclusive) against Santa Fe, a Delaware corporation which has offices and places of business in Richmond and San Francisco, California, within the jurisdiction of this Honorable Court. Santa Fe operates an extensive interstate railroad system which extends from Chicago to the Gulf Coast and to California. A map of that system is attached. Santa Fe was and is a common carrier by railroad engaged in interstate commerce in the State of California and elsewhere, and, as such, subject to the restrictions of the Hours of Service Act.

"2. At 4:30 a.m. on February 14, 1971—the calendar day to which all hourly references herein apply—the crew of Santa Fe train 'Extra 3427 East' went on duty at their home terminal, Richmond, California. There were four men in the crew: W. A. Ward, Conductor; A. B. Kerr and W. C. Byington, Brakemen; and R. C. Moulton, Engineer. Prior to going on duty the day and the hour here involved, these men had been off duty as follows: Mr. Ward—35 hours, 5 minutes; Mr. Kerr—97 hours, 15 minutes; Mr. Byington—28 hours, 20 minutes; and Mr. Moulton—36 hours, 55 minutes.

"3. 'Extra 3427 East' departed Richmond at 4:55 a.m. It arrived at Mormon Yard, Stockton, California (hereafter 'Stockton'), at 8:50 a.m. All four crew members were there released at 9:05 a.m. on an interim period available for rest. For the purposes of this case, the Government concedes that suitable facilities for food and lodging were available to the crew. This release period extended from 9:05 a.m. until the crew was recalled at 2:40 p.m.—a total period of five hours and 35 minutes. Continuing as the crew of 'Extra 3427 East', these same four men departed Stockton at 4:05 p.m. and arrived at their away-from-home terminal, Riverbank, California, at 4:55 p.m. They departed Riverbank on their return or reverse trip at 5:45 p.m., operating train 'Extra 3354 West' back to Richmond,

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their home terminal. Mr. Ward (Conductor) and Messrs. Kerr and Byington (Brakemen) were relieved from duty at Richmond at 8:20 p.m. Before their next tours of duty, Mr. Ward and Mr. Kerr were each off 26 hours, 25 minutes, while Mr. Byington was off 20 hours and 40 minutes. Mr. Moulton (Engineer) was relieved at 8:25 p.m. He was off 26 hours, 20 minutes, before he next went on duty.

"4. Richmond is the recognized 'home terminal' and Riverbank the 'away-from-home' terminal for the crew assignment in this case.

"5. Stockton is a recognized 'home' or 'away-from-home' terminal for at least some Santa Fe train crew assignments, but is not, nor was not, the recognized 'home' or 'away-from-home' terminal for this or other crews assigned to trains operating from Richmond to Riverbank and return.

"6. Some Santa Fe trains do originate or terminate at Stockton—that is, it is the 'home' or 'away-from-home' terminal for some crews. Switch crews are employed there because cars are added to and/or removed from trains at that point. A substantial number of cars are delivered to and received from connecting carriers —namely, Southern Pacific and Western Pacific—at Stockton. Therefore, it is a 'terminal' within the parlance commonly understood in the railroad industry.

"7. Stockton is an historical release point for crews assigned to trains operating from Richmond to Riverbank or the reverse, but is not designated or specified as such by name in any working agreement, bulletin instruction or formal notice. Conversely, nothing in any working agreement, bulletin instruction, or formal notice purported to restrict Santa Fe's right to release the crew involved here at Stockton as it did under the circumstances in question. Trains such as 'Extra 3427 East' being operated from Richmond to Riverbank by a single crew are frequently delayed in transit at Stockton because there are delays in deliveries from

other railroads of cars to be added to the train's consist. Such was the cause of the delay at Stockton involved here.

"8. Although the employees involved in this case received their full hourly or mileage rate of compensation for the duration of the period they were released at Stockton, they were nonetheless free of all responsibilities to and free from supervision by Santa Fe during that period. In other words, their time was their own. There was no way Santa Fe could require them to utilize facilities available for rest. The fact that they were paid during the period in question is not relevant to the merits of the question in issue.

"9. Each member of the crew was and is a member of or represented by a labor organization—the Engineer by the Brotherhood of Locomotive Engineers, the others by the United Transportation Union. Accordingly, the rates of pay, rules, and working conditions of each were and are subject to the terms of a collective bargaining agreement negotiated and administered by and between Santa Fe and their representative labor organizations pursuant to the Railway Labor Act, 45 U.S.C. §§ 151 et seq. If and when Santa Fe allegedly violates the agreed rates of pay, rules, or working conditions of any employee represented by a labor organization, including an employee in the position of any of the men involved here, the prescribed avenue of relief is the filing and processing of an appropriate claim or grievance pursuant to the provisions of Section 3 of the Railway Labor Act, 45 U.S.C. § 153. No claims or grievances were filed on behalf of any men in the crew involved here growing out of their tours of duty on February 14, 1971. It is agreed that 'designated terminal' is an appropriate subject of bargaining under the Railway Labor Act, but there are certain limits. For example, the parties may not agree as to a terminal which lacks adequate facilities for food and lodging.

"10. In this case the Government has charged Santa Fe with violating the Hours of Service Act in that it

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permitted the employees involved to remain continuously on duty in excess of fourteen hours contrary to 45 U.S.C. § 62. There is no question that there would have been no violation of the Act as it stood prior to 1969, when it was substantially amended by the Congress. This case turns upon the interpretation and application of certain new provisions added to the Act as a part of the 1969 amendments. In its present form applicable to these facts, the Act makes it unlawful for a railroad 'to require or permit an employee [actually engaged in . . . the movement of any train], in case such employee shall have been continuously on duty for fourteen hours, to continue on duty or to go on duty until he has had at least ten consecutive hours off duty . . .' 45 U.S.C. § 62(a)(1). The meaning of 'time on duty' brings to bear this portion of 45 U.S.C. § 61:

> (3) Time on duty shall commence when an employee reports for duty and terminates when the employee is finally released from duty, and shall include:
>
> (A) Interim periods available for rest at other than a designated terminal;
>
> (B) Interim periods available for less than four hours rest at a designated terminal . . .

It is agreed that this necessarily means that 'time on duty' does not include 'interim periods available for rest' for four hours or more at a 'designated terminal'. In this case the Conductor and Brakemen went on duty at Richmond at 4:30 a.m. and were finally released at the same point at 8:20 p.m.—15 hours and 50 minutes later. The Engineer went on duty at the same time but was released 5 minutes later than the others, so total elapsed time for him was 15 hours and 55 minutes. If the 5 hours and 35 minutes the men were released at Stockton is to be counted as 'on duty' time, Santa Fe obviously violated the 14-hour limitation of the Hours of Service Act. On the other hand, if that 5 hours and

35 minutes is not to be counted as 'on duty' time, it is equally obvious that the Act was not violated, for the men were 'on duty' about 10 hours—substantially less than the 14-hour maximum. Whether the period of release at Stockton was 'time on duty' is, therefore, the question which separates the Government and Santa Fe, and it presents the ultimate issue here—was Stockton a 'designated terminal' within the proscription of the Hours of Service Act? If it was, there was no violation of the Act. If it was not, the Act was violated. None of the exceptions stated in 45 U.S.C. § 64a(d) are applicable to the facts of this case.

"11. The phrase 'designated terminal' was not one of art in common usage in the railroad industry when it was used by Congress in 1969 in enacting 45 U.S.C. § 61. Nor has it become such in the interim inasmuch as the railroad industry (railroad management), railroad labor and the Federal Railroad Administration on behalf of the public generally do not agree as to its meaning. A number of railroads inquired of the Government (i.e., the Federal Railroad Administration) what it understood the phrase to mean. In a memorandum undated but released in December 1970 which had been prepared by the staff of the Bureau of Railroad Safety of the Federal Railroad Administration 'as an aid to those who come under the jurisdiction of the Hours of Service Act', a number of potential problem areas were discussed, including, as follows, the definition of 'designated terminal':

> The Washington offices of the FRA have received numerous questions about the term 'designated terminal'. Please note the discussion of this term by the Congress in the attached Committee Report. In any event, any terminal at which the employee is released must have available suitable facilities for food and lodging. After numerous conferences with many people interested in the Hours of Service Act, we find that it is necessary to take any 'definition' of the term on a case-by-case basis.

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> If after some experience along this line we find that it is necessary to promulgate a rule setting out the characteristics of a 'designated terminal', the FRA will institute such a proceeding.

A copy of the Committee Report referred to will be included in a packet of legislative history materials furnished the Court. Particularly apropos are the following sentences from page 8 of the Senate Report, which reads in pertinent part:

> The phrase 'designated terminal' in section 1(b)(3)(A) and (B) is intended to have that meaning commonly recognized in the railroad industry. The committee is advised that collective bargaining agreements provide a commonly understood definition for this term. As a minimum the committee intends that the term should mean generally a place where suitable food and lodging are available for employees.

"12. The collective bargaining agreements between Santa Fe and each of the labor organizations representing those crafts or classes of employees whose work involves them in the actual operations of trains use the phrase 'designated terminal' in one instance in each of the said agreements. Such agreements do, however, contain a number of references to 'designated home terminal' and 'away-from-home terminal'. Members of the Washington staff of the Federal Railroad Administration, Office of Chief Counsel and Office of Safety, have reviewed numerous collective bargaining agreements. They have found in agreements in force on other railroads some references to 'designated terminal' and 'away-from-home terminal', and many references to 'designated home terminal'.

"13. The facts of this case are neither unique nor unusual. There are a number of other points on Santa Fe's system where, due to operating conditions or circumstances and consistent with custom and practice, crews might be and are released at other than their

home or away-from-home terminals for more than four hours and where suitable facilities for food and lodging are available. The same is true to a greater or lesser degree of the operations of most other major railroads in the United States. However, the Federal Railroad Administration has been for over a year, and is presently, taking exception to such operations, and has filed claims for alleged violations of this Act under the provisions of the Federal Claims Collection Act of 1966. This case originally arose under the provisions of the Federal Claims Collection Act. It is agreed, however, that in these other claim cases those railroads do not concur in the interpretation of the said FRA. Although Santa Fe and presumably other railroads could, if necessary, so arrange their operations as to accommodate an interpretation of 'designated terminal' limiting it to a crew's 'home' or 'away-from-home' terminal, the economic burden of doing so would be very substantial. The issue involved is vitally important to the Department of Transportation's Federal Railroad Administration, to the railroad industry generally, to railroad labor, and to the general public. It involves a novel question of law which is a product of the recently amended Hours of Service Act.

"14. If this Honorable Court finds that under the facts of this case Santa Fe violated the Hours of Service Act, judgment should be entered for the Government in the amount of $500 for each of the four employees involved, or a total of $2,000, as provided in 45 U.S.C. § 64a(a). The Government should also have its costs. If the Court finds that Stockton was a 'designated terminal' for the crew involved within the meaning of the Hours of Service Act, it should dismiss the complaint and award costs to Santa Fe."

The office of the United States Attorney for the Northern District of California, to which this case was referred, first filed an appropriate Complaint against Santa Fe (R. 1-3). It was not until a few weeks later that it questioned the use of the FRA Stipulation. Although we continued to in-

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sist upon the binding effect of this Stipulation and expressly reserved our right to rely upon it, we agreed to execute a second stipulation to satisfy the Assistant United States Attorney to whom the matter had been assigned for handling.

In the District Court proceedings, no one questioned the binding effect of the FRA Stipulation, and the role of the FRA therein is pointed up by the fact that the government's case was argued orally to the District Court by the same Assistant Chief Counsel, Enforcement Division, Department of Transportation, Federal Railroad Administration, who had signed the FRA Stipulation. It was not until oral argument before the Court of Appeals that an attorney from the office of the United States Attorney—who had not played any prior role in the case—questioned the binding effect of the FRA Stipulation, and not much was made of the point even then.

The Court of Appeals seems to have assumed that the FRA Stipulation is binding. For our part, we cannot conceive otherwise.

REASON FOR GRANTING WRIT

The Writ of Certiorari herein sought should be granted for one very good reason—the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

ARGUMENT

1. The Question Presented is Important to Administration of the Hours of Service Act.

Although the basic Hours of Service Act has been in effect since 1907, 34 Stat. 1415, the question here presented is new because of substantial amendments to the Act in 1969 which, among other things, added the Section 1(b)(3)(B) involved in the case at bar.

The importance and novelty of the question presented are settled by the last two sentences of ¶13 of the FRA Stipulation, p. 10, *supra*:

> "The issue involved is vitally important to the Department of Transportation's Federal Railroad Administration, to the railroad industry generally, to railroad labor, and to the general public. It involves a novel question of law which is a product of the recently amended Hours of Service Act."

2. The Court of Appeals May Have Decided the Important Question Presented Incorrectly.

Although the purpose of this Petition makes an extended argument on the merits inappropriate, we feel we must at least outline our position and explain why we believe it warrants consideration by this Court.

The basic purpose of the Hours of Service Act is "to promote safety in operating trains by preventing the excessive mental and physical strain which usually results from remaining too long at an exacting task." *Chicago & Alton R.R. Co.* v. *United States,* 247 U.S. 197, 199-200 (1918). The Santa Fe employees involved here were released for rest on the occasion presented at Stockton, California, a point which is admittedly a "terminal" and at which it is conceded "suitable facilities for food and lodging

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were available." FRA Stipulation, ¶s 3, 6, *supra,* pp. 4-5. If Stockton under these circumstances qualified as a "designated terminal" within the purview of new Section 1(b)(3)(B) of the Act, the time during which this crew was released there is not to be counted as "on duty" and Santa Fe did not violate the Act. On the other hand, if Stockton is not a "designated terminal," the release time is to be included as "on duty" and there was a violation of the Act. FRA Stipulation, ¶ 10, *supra,* at pp. 6-8.

Unfortunately, no one—including Congress—knew what "designated terminal" meant when the phrase was injected into the Act for the first time in 1969, and it is no better understood today. FRA Stipulation, ¶ 11, *supra,* at pp. 8-9. It has been left to the courts to devise a sensible construction consistent with the purpose of the Act.

We contend that a "designated terminal" is any "terminal" like Stockton, California, which is "designated" by railroad management as a release point for a train crew and which affords that crew adequate facilities for food and lodging. This construction is supported by the pertinent legislative history considered in context, is practical and makes sense, is consistent with custom and practice as modified by Congress, and serves the cause of safety without imposing substantial and unnecessary burdens on Santa Fe and the rest of the nation's railroads.

The government now presents a very simple and straightforward argument. It contends that "designated terminal" plainly means only "home" or "away-from-home" terminal. This position, however, is contradicted by concessions in the FRA Stipulation, ¶ 11, *supra,* at pp. 8-9. It also finds no support in the legislative history, is wholly impractical, is wanting in common sense, and would contribute nothing to the cause of railroad safety.

The FRA knows all too well that the problem is not as simple as the government would have it appear. Apart from its role in this litigation, the FRA has consistently declined to go further with respect to the meaning of "designated terminal" than to state that "suitable facilities for food and lodging" must be available. Thus, it released in December 1970 an undated document styled "FRA MEMORANDUM 1-71", the opening sentence of which stated that, "This memorandum was prepared by the Staff of the Bureau of Railroad Safety as an aid to those who come under the jurisdiction of the Hours of Service Act." It thereafter proceeded to give advice as to the Act's application to different aspects of railroading. A separate section was devoted to "DESIGNATED TERMINAL," reading as follows:

> "The Washington offices of the FRA have received numerous questions about the term 'designated terminal.' Please note the discussion of this term by the Congress in the attached Committee Report. In any event, any terminal at which the employee is released must have available suitable facilities for food and lodging. After numerous conferences with many people interested in the Hours of Service Act, we find that it is necessary to take any 'definition' of the term on a case-by-case basis. If after some experience along this line we find that it is necessary to promulgate a rule setting out the characteristics of a 'designated terminal' the FRA will institute such a proceeding." FRA Stipulation, ¶ 11, *supra,* pp. 8-9.

On January 9, 1973, the FRA issued an updated "MEMORANDUM 1-73" on the same subject. (R. 106). Although this included a number of changes from the one released in December 1970, there was no change at all in the portion directed to "DESIGNATED TERMINAL." As of this writing, we are not aware that the FRA has ever gone further to define "designated terminal" than it did in its "FRA MEMORANDUM 1-71," *supra.* Nor, to our knowl-

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edge, has it ever instituted a proceeding to promulgate a rule setting out the characteristics of a "designated terminal," as it said it might.

The majority of the Court of Appeals, ruling in favor of the government, concluded that "designated terminal" means a particular crew's specified "home" or "away-from-home" terminal. Legislative history provided the principal source material for that opinion, the majority finding sufficient support therein for its conclusion while conceding that that history "is not so clear as the government asserts." (Page A-5, *infra.*)

The majority erred. Its reliance on legislative history is misplaced, for, as District Judge Schnacke and dissenting Circuit Judge Wright noted—properly, we believe—that history is "ambiguous." (Pages A-15, B-5, *infra.*) In addition, the majority failed to consider adequately (1) the purpose of the Act, including the 1969 amendments, (2) the illogical, impractical, and unreasonable consequences of its decision, and (3) the "very substantial" economic burden on Santa Fe and other railroads which compliance with its decision will entail (FRA Stipulation, ¶ 13, *supra,* pp. 9-10). These are matters with which we would deal at length in a full brief on the merits.

Four federal judges have heard and ruled upon the case at bar. At least in terms of numbers, the result to date has been a stand-off. District Judge Schnacke ruled and dissenting Circuit Judge Wright would have ruled in our favor. Clearly, therefore, there must be substance to our arguments entitling them to consideration by this Court.

There is another recent decision to be considered—*United States* v. *Chesapeake and Ohio Ry. Co.,* 399 F.Supp. 480 (N.D. Ind., 1975). It also involved Section 1(b)(3)(B) of the Hours of Service Act, but it arose from such unique facts that it is of very limited value as precedent. However, although District Judge Eschbach there declined to decide

whether "designated terminal" is to be limited to the "home" or "away-from-home" terminals of each railroad crew, he did indicate that he was disposed to reject the government's argument and to hold that a point which is a "home" or "away-from-home" terminal for any crew could be a "designated terminal" for it and any other crew. 399 F.Supp. at 485-86.

This serves to illustrate just one of the ways the construction adopted by the majority below can be shown to be unrealistic and unreasonable. It is stipulated that Stockton is a "home" or "away-from-home" terminal for some Santa Fe crews operating in the area but not for the particular crew involved here. FRA Stipulation, ¶s 5, 6, *supra*, p. 5. According to the government's construction of the phrase accepted by the majority below, Stockton must therefore be a "designated terminal" for some Santa Fe crews. This means that the time consumed in releases of some crews at Stockton for four hours or more will not be counted as "on duty" while releases of other crews at the same point for the same periods cannot be excluded in determining "on duty" times. Bearing in mind that safety is the objective of the Act, how could it be that the cause of safety would be served for some crews by releases at Stockton but would not be served by releases of other crews? Of course, this cannot be, and we submit that no court should attribute to Congress an intention to have such an impractical result. *United States* v. *American Trucking Assns.*, 310 U.S. 534, 543 (1940).

Several other impractical consequences of the decision of the majority below come readily to mind. We shall refer to but one more here.

It took the train involved in this case only 50 minutes to go from Stockton, where the disputed release of the crew had been effected, to Riverbank, which is admittedly this

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crew's "away-from-home" terminal. FRA Stipulation, ¶s 3, 4, *supra*, pp. 4-5. Under the decision which we submit should be reviewed by this Court, the release at Stockton, which has been held not to satisfy the Act's requirements for exclusion from "on duty" time, would have satisfied the Act if it had been accorded at Riverbank, less than an hour's running time away. We submit that Congress could not have intended such an obviously artificial construction of § 1(b)(3)(B).

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

David E. Parry
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By .....

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March 8, 1976

CERTIFICATE OF SERVICE

I hereby certify that three true copies of the foregoing Petition For Writ Of Certiorari were Air-Mailed, postage prepaid, this 8th day of March, 1976 to:

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY CO.,
Defendant-Appellee.

No. 74-1061

OPINION

[November 10, 1975]

On Appeal from the United States District Court for the Northern District of California

Before: DUNIWAY, ELY, and WRIGHT, Circuit Judges

DUNIWAY, Circuit Judge

The United States sued the Santa Fe Railway under 45 U.S.C. § 64a(a) for statutory penalties for violations of the railroad Hours of Service Act, 45 U.S.C. §§ 61-64b. The only question is what Congress meant when it used the term "designated terminal" in 45 U.S.C. § 61(b)(3). On cross-motions for summary judgment, the district court refused to impose the penalties and entered judgment for the Santa Fe. *United States* v. *Atchison, Topeka & Santa Fe Railway Co.*, N.D. Cal., 1973, 363 F. Supp. 644. The government appeals, and we reverse.

I. *The Facts.*

The facts were stipulated. At 4:30 a.m. on February 14, 1971, the crew of Santa Fe's "Extra 3427 East" train went on duty at Richmond, California, the crew's "home terminal." The four crew members—an engineer, two brake-

men, and a conductor—had all been off duty for at least 24 hours. At 4:55 a.m. "Extra 3427 East" and crew left Richmond for Riverbank, California, the crew's "away-from-home" terminal. About four hours later, at 8:50 a.m., they arrived at Mormon Yard, Stockton, California, a major switching point, and stopped there to permit the interchange of cars with connecting carriers. At 9:05 a.m. all four crewmen were released for rest at Stockton, where suitable facilities for food and lodging were available. The release period lasted 5 hours and 35 minutes, until the crew was recalled at 2:40 p.m.

Continuing as the crew of "Extra 3427 East," the same four men left Stockton at 4:05 p.m. and reached Riverbank, which is much smaller than Stockton, at 4:55 p.m. After a brief stop, they left Riverbank at 5:45 p.m. to return to Richmond as the crew of Santa Fe's "Extra 3354 West." Upon returning to Richmond, the conductor and brakemen were relieved from duty at 8:20 p.m., and the engineer was relieved at 8:25 p.m. In all nearly sixteen hours had elapsed from the time the crew first reported for duty in the early morning until they were relieved that evening.

The crew members were represented by two labor organizations—the engineer by the Brotherhood of Locomotive Engineers, and the others by the United Transportation Union—both of which are *amici curiae* in this case. The rates of pay, rules and working conditions of the employees were and are subject to the terms of collective bargaining agreements negotiated between the Santa Fe and the unions.[1]

[1] Under those agreements, grievance procedures were available to the employees for any alleged violations of agreed rates of pay, rules, or working conditions. No claims or grievances arising out of the February 14, 1971, Richmond-Riverbank-Richmond run were filed by any of the crew members. They were paid their full hourly or mileage rate of compensation for the duration of their service on

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Under the pertinent collective bargaining agreements, Richmond was the recognized "home" terminal and Riverbank the "away-from-home" terminal for the crew assignment in this case. Stockton was a recognized "home" or "away-from-home" terminal for some other Santa Fe crew assignments but not for this or any other crew assigned to the Richmond-Riverbank-Richmond run. Stockton is "an historical release point" for crews on this run, but was not designated or specified as such in any collective bargaining agreement, bulletin instruction, or formal notice.

II. *The Issue.*

On the date in question, it was unlawful under 45 U.S.C. § 62(a)(1) for the Santa Fe to require or permit an employee to continue on duty for more than fourteen hours (now the limit is twelve hours) until the employees had at least ten consecutive hours off duty. With some indirection, 45 U.S.C. § 61(b)(3) excludes from the computation of time on duty any period of four or more hours available for rest at a "designated terminal":

> Time on duty shall commence when an employee reports for duty and terminate when the employee is finally released from duty and shall include:
>
> (A) Interim period available for rest at other than a designated terminal;
>
> (B) Interim periods available for less than four hours rest at a designated terminal;
>
> . . . .

The statute does not define "designated terminal," and we must decide whether Stockton was a "designated terminal" for the crew in this case.

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that day, including the period of release at Stockton. That the employees were fully paid and that they filed no grievances are facts which do not bear directly on the merits of the issue in this case. We recite them merely to place the dispute in context.

The government argues that "designated terminal" means the "home" or "away-from-home" terminal for a particular crew assignment as designated in a collective bargaining agreement. Because Stockton was not so designated in this case, the government contends that the time spent there, though available for rest, must be included in computing the time that the crew was on duty. Accordingly, the government says that the crew was on duty for nearly sixteen hours in violation of the fourteen-hour limit and seeks to impose on the Santa Fe a $2,000 penalty ($500 for each employee) as prescribed by 45 U.S.C. § 64a(a).

The Santa Fe, on the other hand, argues that a "designated terminal" is "any 'terminal' like Stockton, California, which is 'designated' by railroad management as a release point for a train crew and which affords that crew adequate facilities for food and lodging." Appellee's Brief at 8. The railroad argues that, because Stockton has been established as a release point by "custom and practice," the 5 hours and 35 minutes spent there do not count as time on duty. Thus the Santa Fe's position is that the crew was on duty for only 10 hours and 20 minutes—well under the fourteen hour limit.

The district court agreed with the Santa Fe and held that the government had failed to "convince the Court that Stockton is *not* a 'designated terminal.'" 363 F. Supp. at 648 (emphasis by the district court). However, for the reasons discussed below, the government has convinced us.

III. *The Meaning of "Designated Terminal."*

A. *The Legislative History.*

The Congress introduced the term "designated terminal" into section 1(b)(3) of the Hours of Service Act, 45 U.S.C. § 61(b)(3), by the Act of December 26, 1969, P.L. 91-169,

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83 Stat. 463, which was designated to bring the safety provisions of the Hours of Service Act, originally enacted in 1907, up to date. While these 1969 amendments to the Act were under consideration, the Congress was amply forewarned that "designated terminal" would prove to be a troublesome term unless it was specifically defined. Reginald Whitman, then Administrator of the Federal Railroad Administration, Department of Transportation, told a Senate subcommittee:

> Section 1(b)(3) is new. It defines "time on duty" but in so doing adds new undefined terms to the Hours of Service Law which could generate considerable litigation and result in conflicting court decisions.
>
> The term *"designated terminal"* is one case in point. The bill does not provide any standard for *"designated terminals"* such as a requirement that it provide adequate facilities for meals, rest and relaxation nor does it indicate how and by whom a terminal is to be designated. . . .
>
> *Hearings on S. 1938 Before the Subcomm. on Surface Transportation of the Comm. on Commerce,* 91st Cong., 1st Sess. 193 (1969) (emphasis in original).

Mr. Whitman's testimony before a House committee considering a parallel bill was similar. *Hearings on H.R. 8449 Before the House Comm. on Interstate and Foreign Commerce,* 91st Cong., 1st Sess. 266 (1969). Had the Congress heeded these warnings and provided its own lexicon, this case would not be here. The Congress did not and so, as happens all too often, we are the Congress' lexicographers by default.

While the legislative history is not so clear as the government asserts, it does provide us with a crucial clue to the etymology of the cryptic term. With respect to the "time on duty" provisions of the 1969 legislation, the Senate Committee on Commerce reported:

> The phrase "designated terminals" in section 1(b)(3)(A) and (B) is intended to have that meaning commonly recognized in the railroad industry. The committee is advised that collective bargaining agreements provide a commonly understood definition for this term. As a minimum the committee intends that the term should mean generally a place where suitable food and lodging are available for employees.
>
> *S. Rep. No. 91-604,* 91st Cong., 1st Sess., 1969 U.S. Code Cong. & Ad. News 1636, 1640.

Thus we know at least that Congress used "designated terminal" with the understanding that collective bargaining agreements would give the term meaning.

It is apparent from the Senate hearings on the 1969 legislation that Congress was so informed by R. R. Manion—then Vice President, Operations and Maintenance Department, Association of American Railroads, and chief spokesman for the railroads in opposition to the legislation—in a statement presented to a Senate subcommittee:

> The pending bills provide that interim periods available for rest shall be counted as time on duty except those lasting 4 or more hours at what are referred to as "designated terminals." The term "interim period available for rest" is not defined, nor is the term "designated terminal."
>
> . . . .
>
> The term "designated terminal" is used in the bills to identify the kind of place at which interim periods of appropriate length may be excluded from duty time and is distinguished from "other than designated terminals" where all interim periods for rest are counted as time on duty.
>
> *The term has significance in relation to the provisions of collective bargaining agreements and refers to terminals that are "designated" in such agreements.* It does not determine the question whether a given place is one at which suitable rest can be obtained.

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> Our view is that any place where reasonable facilities for food and rest are available to employees should qualify as the kind of place at which interim rest periods—of suitable length—should not count as time on duty. This concept should be substituted for the technical term "designated terminal." Food and rest are essential physical requirements for a meaningful rest period, and they may well be obtainable at places that are not "designated" in collective bargaining agreements.
>
> *Hearings on S. 1938, supra,* at *122-23* and *138* (emphasis supplied).

This testimony does much to illuminate the terse, and perhaps somewhat misleading, explanation of "designated terminals" in the Commerce Committee report.

First, we note that Mr. Manion said that certain terminals are *designated* (*i.e.*, specified or identified—see note 2 *infra*) in collective bargaining agreements—not, as the committee report might be read to suggest, that such agreements contain a universal description or dictionary-style definition of a "designated terminal," or that such agreements label certain places as "designated." As the district court below observed, 363 F. Supp. at 647, the terminals which collective bargaining agreements commonly designate are the "home terminal" and the "away-from-home terminal" for each crew assignment. Sometimes the terminals so designated are indeed labelled as "designated" terminals. *Id.* Indeed, the pertinent collective bargaining agreements of the Santa Fe use these terms in this way. We think that this designation process, effected by collective bargaining agreement, must be the referent of the statutory shorthand "designated terminal."

Subsequent comments by Mr. Manion bolster our conclusion. Discussing other provisions of the proposed hours of service legislation, he stated:

> In addition, the bills as drawn would apply the provisions of section 1, which relate to interim rest periods and deadhead transportation, to telegraphers and dispatchers as well as to railroad operating employees. There is no reason to do this because telegraphers, train dispatchers, and similar employees work at stationary places and those provisions do not properly pertain to them. Those employees do not have "designated terminals" or work from a home terminal to any away-from-home terminal, as operating employees do.
>
> *Hearing on S. 1938, supra,* at 123.

Although "designated terminal," "home terminal," and "away-from-home terminal" were all used loosely throughout the hearings and debates in 1969, this comment ties them together and indicates that the "home" and "away-from-home" terminals were the "designated terminals" Congress had in mind.

To dispute what seems to be the import of the Commerce Committee report, read in light of Mr. Manion's testimony, the Santa Fe relies on what it claims is a supplementary set of stipulated facts. Those facts were stipulated, before the institution of this action, between the Santa Fe and attorneys of the Federal Railroad Administration ("FRA"), the division of the Department of Transportation charged with administration of the Hours of Service Act. *See* 45 U.S.C. §§ 64a(b), 64b. However, the United States Attorney, charged under 45 U.S.C. §§ 64a(a) with litigating Hours of Service Act enforcement actions, never agreed to the supplementary facts. Whether the United States Attorney is bound by the "FRA stipulation" is a novel question which troubles us, but it is one we need not decide.

Assuming *arguendo* that the "FRA stipulation" was binding, we conclude that it does not help the Santa Fe. Paragraph 11, on which the Santa Fe primarily relies, states in part:

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> 11. The phrase "designated terminal" was not one of art in common usage in the railroad industry when it was used by Congress in 1969 in enacting 45 U.S.C. § 61. Nor has it become such in the interim inasmuch as the railroad industry (railroad management), railroad labor and the Federal Railroad Administration on behalf of the public generally do not agree as to its meaning....

That "designated terminal" was not a term of art in common usage in the railroad industry is not determinative, however.

What matters in our view is what collective bargaining agreements, which formed the backdrop against which the legislation was enacted, say. In that connection, paragraph 12 of the "FRA stipulation" states:

> 12. The collective bargaining agreements between Santa Fe and each of the labor organizations representing those crafts or classes of employees whose work involves them in the actual operation of trains use the phrase "designated terminal" in one instance in each of the said agreements. Such agreements do, however, contain a number of references to "designated home terminal" and "away-from-home terminal." Members of the Washington staff of the Federal Railroad Administration, Office of Chief Counsel and Office of Safety, have reviewed numerous collective bargaining agreements. They have found in agreements in force on other railroads some references to "designated terminal" and "away-from-home terminal," and many references to "designated home terminal."

Thus, even the "FRA stipulation" recognizes that the terminals designated, and sometimes expressly labelled as "designated," in collective bargaining agreements are the "home" and "away-from-home" terminals.

Second, we note that Mr. Manion supplemented his comments and criticisms by proposing on behalf of the railroads

specific amendments to the then pending bill. *Hearings on S. 1938, supra,* at 127-28. By one such amendment the railroads would have substituted for the words "designated terminal" that now appear in 45 U.S.C. § 61(b)(3) the words "place where reasonable facilities for food and rest are available to employees." *Id.* at 153.[2] That Congress did not adopt this proposal indicates that Congress rejected the notion that any place with a coffee shop and motel or something similar would serve as a suitable rest stop.

The definition of "designated terminal" which the Santa Fe now urges is virtually the same as that which Congress rejected—except that the Santa Fe adds two new elements: (1) that the place having adequate facilities also be a "terminal" and (2) that it be "designated" in some way by railroad management. Neither additional element makes any

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[2]The stated reasons for this proposed amendment echoed Mr. Manion's testimony:

> There is need to define the kind of place at which a rest period of proper duration will not be counted as time on duty. Setting aside the question of how long a rest period should last, it would seem that any place where the essential physical requirements for a meaningful rest period are available will meet the demands of the law. Those requirements are reasonable facilities for food and rest for employees. Such facilities should be adequate and genuine.
>
> The term "designated terminal" has significance in relation to the provisions of collective bargaining agreements. It refers to certain terminals that are so *identified* in such agreements. It does not determine the question whether a given place is one at which suitable rest can be obtained. It is quite possible that reasonable facilities for food and rest are obtainable at places other than terminals that are "designated" in labor agreements. If so, rest periods of appropriate length at those places should be excluded from time on duty for hours of service purposes.

Hearings on S. 1938, supra, at 153 (emphasis supplied).

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difference. In railroad parlance, the word "terminal" has reference to a particular crew and run. *United States v. Atchison, Topeka & Santa Fe Railway Co.*, D. Ariz., 1914, 212 F. 1000, 1007. *See also Atchison, Topeka & Santa Fe Railroad Co. v. United States,* 1917, 244 U.S. 336, 341-42 (stipulated fact). We think, therefore, that § 61(b)(3) refers to the "terminals" which are designated for the particular crew and run involved. The Santa Fe has advanced no reasons, and we can think of none, why a stop at any place with minimum facilities would be any more conducive to rest just because it happened to be a "terminal" for other trains and other crews. And certainly to add that the place must be unilaterally designated by management would be to require a pointless formality. We think that Congress must have intended to require a bilateral designation process.

Moreover, it was not superfluous, as the Santa Fe seems to argue, for the Senate committee to state the minimum food and lodging requirements if it meant to require more. It may be that some "home" and "away-from-home" terminals designated in collective bargaining agreements do not meet even those minimum requirements. It would therefore be reasonable for Congress to require both that release points be contractually established and that they have adequate food and lodging facilities. We think that is what Congress did.

B. *Policy Considerations.*

The Santa Fe argues that the government's construction of "designated terminal" will impose substantial costs on railroad operations without significantly promoting safety. But we note that the railroads made similar arguments to Congress in generally opposing the 1969 amendments to the Hours of Service Act. *See, e.g., Hearings on S. 1938,*

supra, at 13, 109, 119-20, 123-25, 160, 211, 220; *Hearings on H.R. 8449, supra,* at 128-35, 183-84, 201-05, 245; 115 CONG. REC. 29318-20 (1969). We can only conclude that Congress weighed the railroads' arguments and found them wanting.

We are guided here by the Supreme Court's admonition in *Atchison, Topeka & Santa Fe Railway Co. v. United States, supra,* 244 U.S. at 343, that "[the Hours of Service Act] is remedial and in the public interest, and should be construed in light of its humane purpose." Accordingly, we think that Congress could sensibly have concluded that rest periods best serve their function at a known location at the midpoint of a run where the crew has its established "away-from-home" terminal or at the end of a run where the crew has its established "home" terminal.

The facts of this case are illustrative. The crewmen were awakened at a very early hour; they were on duty for only about four and one-half hours before they were released for "rest"—if any they needed then. After being "off" for about five and a half hours, they were "on" again for almost six straight hours. It would not surprise us if at the end of their sixteen hour day the crewmen were fatigued and their abilities to perform their duties impaired. *See id.* at 342.

Worse, under the Santa Fe's view, it could presumably even reverse this run as follows: start from Riverbank towards Richmond; stop at Stockton for switching; continue to Richmond; turn around; and immediately return to Riverbank. Conceivably then the crew would be required to work one pre-dawn hour (Riverbank to Stockton); rest four hours at Stockton—if they could get meaningful rest under those circumstances; and then work up to eleven[3] hours straight (Stockton to Richmond to Riverbank). Such potential for fatigue and the consequent safety hazard are

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what the Hours of Service Act was intended to eliminate. *Id.* at 343.

We think that the safety hazards would be mitigated by requiring that stops which toll the running of time on duty be made only at a crew's contractually established, i.e., "designated," "home" or "away-from-home" terminals. There the crewmen will presumably be in familiar surroundings and can establish regular accommodations for rest. Moreover, rest stops will presumably be spaced more evenly and effectively to break up monotonous long runs.

If, given established routes, this requirement is impractical, the railroads and unions are free to renegotiate "home" and "away-from-home" terminal designations. Indeed, railroads and unions may also be free to establish "designated terminals" for purposes of the Hours of Service Act at places other than the "home" and "away-from-home" terminals designated for other collective bargaining purposes. *Cf.* 45 U.S.C. § 64 (declaring that hours of service shorter than the statutory maximum are proper subjects of collective bargaining). That question we need not decide here because Stockton was neither the crew's "home" nor its "away-from-home" terminal nor was it otherwise designated by collective bargaining machinery as a release point for this crew. On this record, we decline to go further than necessary to decide this case.

IV. *Conclusion.*

We hold that the term "designated terminal" as used in the Hours of Service Act, 45 U.S.C. § 61(b)(3), refers to

[3] By making it unlawful to require or permit an employee "to continue on duty or to go on duty when he has not had at least eight consecutive hours off duty during the preceding twenty-four hours," 45 U.S.C. § 62(a)(2) appears to limit the elapsed time from going on duty to going off in this hypothetical example to sixteen hours (one hour on, four off, plus eleven on).

terminals designated in or under collective bargaining agreements. Because Stockton was not so designated for the instant crew, the layover at Stockton should have been counted as time on duty. The Santa Fe therefore violated the Hours of Service Act.

The judgment is reversed and the case is remanded with directions to enter a judgment for the United States.

WRIGHT, Circuit Judge, dissenting:

With due respect, I dissent and would adopt the language of the district court:

> Here the Government is attempting to impose a serious sanction. It must therefore convince the Court that Stockton is *not* a "designated terminal". It suffices to say that it has not done so. If Congress intended to provide that Stockton and similar cities are not "designated" terminals, i.e., not appropriate for the purposes of the legislation, its message has not carried across to this Court.

United States v. Atchison, Topeka & Santa Fe Railway Co., 363 F. Supp. 644, 648 (N.D. Cal. 1973).

I would hold that any Santa Fe terminal as defined in the collective bargaining agreement which meets the minimum food and lodging standards is a designated terminal for the purposes of this Act unless the relevant collective bargaining agreement specifically excludes it.

The majority observes, Note 1, that grievance procedures were available to the train crew, that they were paid for the run in question and for the time spent in Stockton, and that they made no complaint and filed no grievance. I disagree with the conclusion that these "are facts which do not bear directly on the merits of the issue in this case." Rather, they convince me that the interpretation of the term "designated terminal," as applied to a specific run, should be left to the collective bargaining process.

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There are times when a court should look to ways in which persons have reacted in response to a statute as an aid to interpreting the statute's meaning. The analysis used by the late Professor Henry Hart and Professor [now Dean] Albert Sacks of Harvard Law School in interpreting the terms "work," "workweek," and "working time" for purposes of the Fair Labor Standards Act of 1938 [29 U.S.C. § 201 *et seq.*] can be applied to the case at bar.

> Evidence of the common understanding of the terms "work" or "working time" or "workweek" [or designated terminal"] might be thought to be relevant for two reasons: first, as a showing, at the least, that the words would bear the meaning reflected in the understanding; and second, as showing, on the basis of the assumption that the legislature used the words in their ordinary signification to the people affected, that this meaning was the correct one.

H. M. Hart and A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law, 1299 (tent. ed. 1958). The fact that no grievance was filed indicates that those affected did not find Stockton unacceptable or a breach of the collective bargaining agreement which regulates the designated terminals.

The majority's reliance on testimony before a Congressional committee, in determining Congressional intent, is misplaced. As noted by the district court, the testimony is ambiguous. In the absence of a clear expression of legislative intent, I would look to the purpose of the statute to find the meaning of "designated terminal."

The plain language of § 64 demonstrates why a broad definition of the term should be favored. It reads:

> The requirements imposed by sections 61 to 64b of this title with respect to time on duty of employees are hereby declared to result in the maximum permissible

> hours of service consistent with safety. However, shorter hours of service and time on duty of employees for lesser periods of time are hereby declared to be proper subjects for collective bargaining between any common carrier subject to sections 61 to 64b of this title and its employees.

45 U.S.C. § 64.

If Stockton could be considered as a designated terminal for purposes of the Hours of Service Act,[1] then Section 64 would seem to place the burden of bargaining on the unions to determine that Stockton is not so designated.

The primary purpose of the Hours of Service Act is to provide minimum standards to insure safety. Congress appears also to have intended to encourage both railroads and unions to bargain above these minimums. The majority position interferes with the bargaining by setting a status quo ante which is above the implied minimum standards. I do not read the statute to go so far.

I would affirm the district court's judgment on the basis that Stockton was a designated terminal within the broad definition.

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[1] Using the majority's definition it is possible for the railroad to accomplish the dire result which the majority relates at page 11 without violating the Act. Riverbank would be the home terminal and Stockton and Richmond would be away-from-home terminals for this crew. It seems clear that the Hours of Service Act will permit the railroad to take its employees away from their homes for up to 16 hours per day, *e.g.*, 12 hours on duty [45 U.S.C. § 62(1)], 4 hours off at a designated terminal [45 U.S.C. §§ 61(b) A, B], and 8 hours at home [45 U.S.C. § 62(2)].

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APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, *Plaintiff*, vs. THE ATCHISON, TOPEKA & SANTA FE RAILWAY CO., *Defendant*.	C-73-0238 RHS OPINION AND ORDER

[As Amended Oct. 23, 1973.]

SCHNACKE, District Judge.

This is an action by the United States pursuant to 45 U.S.C. § 64a(a) to recover the statutory penalty for violation of 45 U.S.C. § 62(a)(1), a part of the federal Hours of Service Act, 45 U.S.C. §§ 61-64b, *infra*. It is before the Court on cross-motions for summary judgment. The United Transportation Union and the Brotherhood of Locomotive Engineers have filed briefs *amicus curiae* in support of plaintiff's motion.

The facts are stipulated: Four employees of defendant undertook a single run of defendant's railroad on February 14, 1971; the run commenced at Richmond, California and ended at Riverbank, California some sixteen hours later. Without more, a run of this duration would clearly violate § 62(a)(1) and defendant would be liable for the statutory penalty of $500 per violation, $2,000 in this case.

However, the run was interrupted for five hours and thirty-five minutes at Stockton, California, where the four men involved were released for this period and were free to do as they pleased, while continuing to be paid pursuant to collective bargaining agreement. Suitable facilities for food and lodging were available at Stockton if the men chose to avail themselves of them.

Thus the ultimate question is whether Stockton qualified as a "designated terminal", § 61(b)(3)(A); if so, by necessary implication, it operated to interrupt the continuity of the period of service for more than four hours, § 61(b)(3)(B), the total thereby being less than fourteen hours, and defendant did not violate § 62(a)(1) as charged.

The original Hours of Service Act was enacted in 1907, Act of March 4, 1907, C. 2939, 34 Stat. 1415, and remained without substantial amendment until the present amendments were adopted in 1969, P.L. 91-196, 83 Stat. 463. As originally enacted, it prohibited service "continuously" by a railroad employee for a period in excess of sixteen "consecutive" hours. Act of March 4, 1907, *supra*, § 3. A considerable body of case and administrative law had developed around the meaning of the expressions "consecutive" and "continuously", particularly as it pertained to layovers of the kind that occurred here at Stockton. Without going into the numerous decisions on this point, the situation may be summarized by saying that the courts and the Interstate Commerce Commission had established a rule of thumb to the effect that layovers of three hours or more at points where food and lodging were available were sufficient to interrupt the continuity of service and therefore should be excluded in calculating the sixteen "consecutive" hours permissible under the statute. However, the courts had never established a flat rule, but had emphasized that the problem was one to be resolved on the case-by-case basis.[1]

[1] There is no dispute among the parties as to the pre-1969 situation. It likewise seems to be agreed that the instant case is one of first impression, and that there are no court decisions either before or after 1969 that go very far toward solving the problem presented here. For that reason, it is unnecessary to give any detailed analysis or citations in connection with the situation before the 1969 amendments.

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By 1969, it was thought to be fairly obvious that, by the mere passage of time and the changing attitudes toward hours of work and conditions of employment, some revision in the Hours of Service Act was in order. It seems apparent that the principal purpose of the amendments considered and adopted in 1969, insofar as they relate to the present problem, was to reduce the previous sixteen-hour period, initially to fourteen hours and then, after a two-year interval, to twelve hours, as reflected in the amendment that is now § 62(a)(1). Incidentally, while they were at it, Congress also saw fit to enact provisions on layoff periods during a run which would override the rule just mentioned, and this is where the present difficulties arose.

In this respect the Committees pursued a dual objective: First, to lengthen the three-hour layover time to four hours and, secondly, to prescribe the locations at which such interrupting layovers would be recognized. Everyone, the courts included, had agreed that a stop in the wilds without opportunity for food and lodging did not afford an adequate opportunity for rest of train crews. The unions were not satisfied, however, with a criterion based on facilities available for food and lodging or with one predicated upon prior railroad practice, and therefore the draftsmen cast about for some more specific term of reference. Faced with conflicting positions of management and the FRA (which, as will be seen, sought some precise test) on one hand and the unions on the other, the Committees recommended, and Congress adopted, the expression "designated terminal", backing it into the present § 61(a)(3)(A) and (B).

Congress had been placed on notice by the Administrator of the Federal Railroad Administration that the quoted term, like others in the pending legislation, was vague and indefinite and was likely to "generate considerable litigation

and result in conflicting court decisions." See hearings of Senate subcommittee on S.1938, Serial No. 91-31, p. 193 (1969). Further emphasizing this point, the Administrator stated "The bill does not provide any standard for *'designated terminals'* such as a requirement that it provide adequate facilities for meals, rest and relaxation nor does it indicate how and by whom a terminal is to be designated." (Emphasis in original.)[2] Despite this, the Committee saw fit to proclaim:

> "The phrase 'designated terminals' in § 1(b)(3)(A) & (B) is intended to have that meaning commonly recognized in the railroad industry. The committee is advised that collective bargaining agreements provide a commonly understood definition for this term. As a minimum the committee intends that the term should mean generally a place where suitable food and lodging are available for employees." S.Rep. No. 91-604, p. 8 U.S. Code Cong. & Admin. News, 1969, p. 1640.

If the Committee was so advised, which is not at all clear from the testimony, it was so advised in error, from all that appears in its proceedings.

In support of the Committee's contention that collective bargaining agreements commonly employ the phrase, the United States Attorney and the Union have submitted a number of such agreements, as well as numerous references to the testimony before the House and Senate Committees. These almost conclusively establish that the accepted terminology in the industry is "home terminal" and "away-from-home terminal". The expression "designated terminal"

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[2] In view of what follows, we need not consider the interesting Constitutional question of delegation of power that would arise were we to follow the suggestion that the matter was left to be defined in private agreements or the question of how such a consequence could be squared with the oft-repeated proposition that the Act is for the protection of public safety.

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occurs occasionally in these agreements, but in each instance it clearly means those designated in the particular agreement and not those commonly referred to as such in the industry. In other words, the term is used as the virtual equivalent of "terminals herein specified", that is to say, it is a cross-reference for purposes of a particular agreement, but certainly the agreements submitted do not establish any common use of the term in the industry except for the limited purpose just mentioned.

The various excerpts from the Committee hearings really undercut plaintiff's position. Faced with the term "designated terminals" at various points in the hearings, the representatives of both management and labor almost unconsciously, it would seem, lapsed away from this term into the familiar terms "home terminal" and "away-from-home terminal". Be that as it may, the expression is in the statute, and we must do the best we can with it. The FRA, familiar as it is with the details of railroad terminology, remains at a loss to expound the meaning of the expression, although a member of its staff, arguing for plaintiff here, assured the Court that its meaning was perfectly clear. In a release dated January 9, 1973, the FRA refers to numerous inquiries as to the meaning of the term and states its present inability to do more than refer to the Committee report, pending possible adoption of a clarifying rule, which has apparently never been done.

Since the legislative history is ambiguous, we heed Mr. Justice Frankfurter's advice and look to the statute. In so doing, we reject the unhappy tendency to treat commonly used words as words of art.[3]

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[3] Likewise, the "canons" of statutory construction are of no help. The present statute is both "remedial" and "penal", as are the statutes proscribing murder, rape and overtime parking. We also note that the single word "terminal" appears in § 64a(d), with the observation that that does not get us anywhere either.

It is stipulated that Stockton is and has long been a railroad terminal. It is a sizeable and substantial community and a center for land- and waterborne transportation. Ample facilities for food, lodging and even recreation are there. It satisfies every legitimate criterion founded upon the undoubted need of railroad employees to rest from their labors.

Since Stockton is clearly a "terminal", we need not explore all the possible interpretations of the word "designated", just as we need not consider the status of every point on the map where a train may stop.

Here the Government is attempting to impose a serious sanction. It must therefore convince the Court that Stockton is *not* a "designated terminal". It suffices to say that it has not done so. If Congress intended to provide that Stockton and similar cities are not "designated" terminals, i.e., not appropriate for the purposes of the legislation, its message has not carried across to this Court.

Plaintiff's motion for summary judgment is denied; defendant's motion for summary judgment is granted, and judgment will be entered for defendant. Counsel for defendant shall submit an appropriate form of judgment in accordance with the procedures set forth in L.R. 123(d).

Dated: August 22, 1973

ROBERT H. SCHNACKE
United States District Judge

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1271

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 525 F.2d 1184. The opinion of the district court (Pet. App. B) is reported at 363 F. Supp. 644.

JURISDICTION

The judgment of the court of appeals was entered on November 10, 1975. On January 26, 1976, Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to March 8, 1976, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The railroad Hours of Service Act limits the number of consecutive hours a railroad employee may be on duty without being off duty for specified periods. It further provides that interim periods available for rest "at other than a designated terminal" are treated as

time on duty. The question presented is whether, as the court of appeals held, "designated terminals" are those designated in collective bargaining agreements rather than, as petitioner contends, those it has unilaterally designated.

STATEMENT

The United States instituted this action in the United States District Court for the Northern District of California to recover statutory penalties from petitioner for violations of the railroad Hours of Service Act, 45 U.S.C. 61 *et seq.*[1] Following the filing of cross-motions for summary judgment on stipulated facts, the district court dismissed the suit (Pet. App. B). The court of appeals reversed, one judge dissenting (Pet. App. A).

At the time this litigation was instituted, 45 U.S.C. 62(a)(1) made it unlawful for any railroad to require or permit an employee to remain on duty for more than fourteen hours (the present limit is twelve hours) until the employee had been off-duty for at least ten consecutive hours. 45 U.S.C. 61(b)(3) provides that in computing the number of hours an employee has been on duty, any period of four hours or more available for rest at a "designated terminal" shall be excluded:

> Time on duty shall commence when an employee reports for duty and terminate when the employee is finally released from duty, and shall include:
>
> (A) Interim periods available for rest at other than a designated terminal;

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[1]Each instance in which a railroad permits an employee to remain on duty in excess of the statutory maximum number of hours constitutes a separate violation and subjects the employer to a penalty of $500. 45 U.S.C. 64a(a). Thus, the United States sought to recover $2,000 in this litigation.

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> (B) Interim periods available for less than four hours rest at a designated terminal; * * * .

The statute does not define the term "designated terminal." The sole question is whether a particular interim stop was a "designated terminal" for the crew of one freight train.

As set forth by the court of appeals (Pet. App. A-1 to A-3), the stipulated facts were that at 4:30 a.m. on February 14, 1971, the four-man crew of petitioner's train reported for duty at its "home terminal" in Richmond, California. Each member of the crew had been off-duty for at least ten hours prior to going to work. The train left Richmond destined for Riverbank, California, the crew's "away-from-home terminal."

At approximately 8:50 a.m., the train arrived at the Mormon Yard, Stockton, California, where it stopped to permit the interchange of cars with connecting carriers. At 9:05 a.m., the entire crew of the train was released for rest at Stockton, where suitable facilities for food and lodging were available. The release period lasted five hours and thirty-five minutes, until the crew was recalled at 2:40 p.m. The crew then boarded the same train and continued on to its "away-from-home" terminal at Riverbank.

After a brief stop-over there, the crew left Riverbank to return to Richmond aboard another train. Following their arrival in Richmond, the members of the crew were relieved from duty between 8:20 p.m. and 8:25 p.m. Including the rest period at Stockton, approximately sixteen hours had elapsed from the time they reported for duty in the morning until their release that evening.

Each of the crew members was represented by one of two labor unions that had entered into collective bar-

gaining agreements with petitioner. Under those agreements, the "home terminal" for the crew of this train was Richmond, California, and its "away-from-home terminal" was Riverbank, California (Pet. App. A-3). While Stockton, California, was not designated as a "terminal" for this or any other crew operating between Richmond and Riverbank, it was a "home-terminal" for a few local and yard crew assignments made by petitioner. In addition, Stockton is "an historical release point" for crews on the Richmond to Riverbank run, but was not specifically so designated in any collective bargaining agreement or formal management notice (*ibid.*).

The district court ruled that since the Stockton interchange point had long been considered a "terminal" by the railroad industry and since it provided ample food and lodging facilities, it constituted a "designated terminal" under Section 61(b)(3) (Pet. App. B-6). Excluding the crew's five hours and thirty-five minutes of released time at Stockton from the computation of its service, it held that petitioner had not violated Section 62(a)(1) (Pet. App. B-2, B-6).

The court of appeals (one judge dissenting) reversed on the ground that Section 61(b)(3) referred to the particular terminals designated for each individual crew and run in the collective bargaining agreements between the railroad and the unions. Since Stockton was neither the contractually designated "home" nor the "away-from-home" terminal for this particular crew, the court concluded that the release period in Stockton was part of the time on duty under Section 61(b)(3)(A) (Pet. App. A-9 to A-11). Therefore, it held that petitioner had violated the Hours of Service Act (Pet. App. A-14).

ARGUMENT

This case presents a narrow question of statutory interpretation under the railroad Hours of Service Act.

The statute provides that the time an employee spends while resting at a "designated terminal" is not time on duty in determining the maximum number of hours that an employee may be on duty without an off-duty period.[2] The issue is whether "designated terminal" refers only to terminals designated as rest places in collective bargaining agreements, as the court of appeals held, rather than, as petitioner contends, any terminal possessing adequate food and lodging facilities that it unilaterally designates as a resting point. There is no conflict among the courts of appeals—indeed the ruling is one of first impression—and the decision is correct. There is accordingly no occasion for further review.

The statutory language and plan support the holding of the court of appeals that "designated terminal" refers to one jointly designated in the collective bargaining agreements rather than one unilaterally designated by the carrier. The unions, no less than the carriers, have a strong interest in the designation of the particular places to be used for off-duty rest in applying the statutory limitation upon the total consecutive hours an employee may work. Congress thus understandingly decided to make the application of this term reflect its commonly recognized meaning in the railroad industry, as defined in the industry's collective bargaining agreements. As the Senate Committee Report on the bill stated (S. Rep. No. 604, 91st Cong., 1st Sess. 8 (1969)):

> The phrase "designated terminals" in section 1(b)(3)(A) and (B) is intended to have that meaning commonly recognized in the railroad industry. The

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[2]The phrase "designated terminal" was first introduced by the 1969 Amendments to the Hours of Service Act, which updated certain safety provisions first enacted in 1907. Act of December 26, 1969, 83 Stat. 463.

> committee is advised that collective bargaining agreements provide a commonly understood definition for this term. As a minimum the committee intends that the term should mean generally a place where suitable food and lodging are available for employees.

This congressional decision reflected the view of the railroad industry itself. R. R. Manion, then Vice-President in the Operations and Maintenance Department of the Association of American Railroads and the chief spokesman for the railroad industry in opposing the legislation, testified before the Senate Committee that the term "designated terminal," while not defined in the proposed legislation, "has significance in relation to the provisions of collective bargaining agreements and refers to terminals that are 'designated' in such agreements." Hearings on Freight Car Supply before the Subcommittee on Surface Transportation of the Senate Committee on Commerce, 91st Cong., 1st Sess. 122-123 (1969).

As the court of appeals pointed out (Pet. App. A-7), the district court noted that

> the terminals which collective bargaining agreements commonly designate are the "home terminal" and the "away-from-home terminal" for each crew assignment. Sometimes the terminals so designated are indeed labelled as "designated" terminals. * * * Indeed, the pertinent collective bargaining agreements of the Santa Fe use these terms in this way.

The court of appeals thus properly concluded (Pet. App. A-12 to A-13):

> Accordingly, we think that Congress could sensibly have concluded that rest periods best serve their function at a known location at the midpoint of a run where the crew has its established "away-

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from-home" terminal or at the end of a run where the crew has its established "home" terminal.

* * * * *

We think that the safety hazards would be mitigated by requiring that stops which toll the running of time on duty be made only at the crew's contractually established, i.e., "designated," "home" or "away-from-home" terminals. There the crewmen will presumably be in familiar surroundings and can establish regular accommodations for rest. Moreover, rest stops will presumably be spaced more evenly and effectively to break up monotonous long runs.

Indeed, the railroad industry sought to change the bill to achieve directly the objective petitioner now seeks to accomplish by judicial interpretation. The industry proposed to substitute for "designated terminal" the words "place where reasonable facilities for food and rest are available to employees." Hearings on Freight Car Supply, *supra*, at 127-128, 153. This is substantially the same standard as petitioner's contention (Pet. 13) that "designated terminal" means "a release point for a train crew and which affords the crew adequate facilities for food and lodging." The refusal of Congress to adopt the railroad's proposal is, as the court of appeals noted (Pet. App. A-10), a further indication that it did not intend the Act to have the meaning petitioner now ascribes to it.[3] See *United States* v. *Seaboard Air Line R. Co.*, 361 U.S. 78, 82-83.

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[3]The last sentence in the passage from the Senate Committee Report quoted above (pp. 5-6)—that "[a]s a minimum" the term "designated terminal" "should mean generally a place where suitable food and lodging are available for employees" (S. Rep. No. 604, *supra*, at 8)—does not indicate that Congress accepted the railroad industry's view. That statement merely reflects the congressional intention that only those terminals designated in the collective bargaining agreements that meet this standard would qualify under the Act as a resting place that would constitute off-duty time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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